

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

STEVEN HUBACHER,

Plaintiff,

v.

LUCENT TECHNOLOGIES, INC. and DOES
1-10,

Defendant.

Case No. 05-5222RJB

ORDER GRANTING
DEFENDANT'S MOTION TO
DEEM MATTERS ADMITTED,
GRANTING DEFENDANT'S
MOTION TO COMPEL, AND RE-
NOTING MOTION FOR
SANCTIONS

This matter comes before the court on the Defendant's Motion to Deem the Matters in Defendant's Requests for Admission as Admitted and to Compel Production of Initial Disclosures and Outstanding Discovery Responses and for Sanctions (Dkt. 10). The court has reviewed the motion, the response, and the file herein.

I. BACKGROUND

On September 24, 2004, the plaintiff filed suit in state court. Dkt. 1. His complaint brings claims for breach of contract, intentional interference with a business expectancy, defamation, and discrimination. *Id.* Lucent Technologies Inc. ("Lucent") filed a notice of removal, asserting that this court has diversity jurisdiction over the case. *Id.*

A. PLAINTIFF'S INITIAL DISCLOSURES

The deadline for initial disclosures was set for June 22, 2005. Dkt. 3. Lucent served plaintiff's counsel, Mary A. Betker, with its initial disclosures on that date. Dkt. 11 at 2. On the same day, Ms. Betker telephoned Lucent to request a continuance on the grounds that she had a

1 family emergency. *Id.* Upon the request of counsel, the court reset the deadline for initial
2 disclosures for August 8, 2005.

3 On September 7, 2005, Jennifer M. Ilenstine, counsel for Lucent, sent a letter to Ms.
4 Betker asking that she provide the plaintiff's initial disclosures by September 27, 2005, and
5 expressing a desire to avoid having to file a motion. Dkt. 12, Exh. 1. Ms. Betker did not respond
6 to this letter. Dkt. 12 at 2.

7 On September 12, 2005, Ms. Ilenstine emailed Ms. Betker to determine that Ms. Betker
8 had received the letter and to inquire when Ms. Ilenstine might expect a response. Dkt. 12, Exh.
9 2. Ms. Betker did not respond to this email. Dkt. 12 at 2.

10 On September 26, 2005, Ms. Ilenstine sent another letter requesting that Ms. Betker
11 provide the plaintiff's initial disclosures and reiterating the defendant's desire to avoid incurring
12 the expense of filing a motion to compel. Dkt. 12, Exh. 3.

13 On October 2, 2005, Ms. Betker emailed Ms. Ilenstine, acknowledging receipt of a letter
14 from Ms. Ilenstine and requesting to speak with Ms. Ilenstine on October 5. Dkt. 12, Exh. 4.

15 On October 5, 2005, Lucent's counsel, Leslie J. Mann, met with Ms. Betker to discuss the
16 fact that Lucent had not received the plaintiff's initial disclosures. Dkt. 11 at 2. Ms. Betker
17 assured Ms. Mann that she would send the initial disclosures no later than October 7, 2005. *Id.* at
18 3. As of the filing of the defendant's motion on January 5, 2006, the defendant had not received
19 the plaintiff's initial disclosures. *Id.* Lucent moves for an order compelling production of the
20 plaintiff's initial disclosures. Dkt. 10-1.

21 **B. DEFENDANT'S DISCOVERY REQUESTS**

22 On November 11, 2005, defendant served interrogatories and requests for production on
23 Ms. Betker. Dkt. 11 at 3. On January 5, 2006, Ms. Betker left Ms. Ilenstine a voice message
24 stating that she would send responses to Lucent's interrogatories on January 9, 2006. Dkt. 12 at
25 3. Lucent moves for an order compelling the plaintiff to respond to these requests. Dkt. 10.

26 Lucent also served requests for admissions on November 11. Dkt. 11 at 4. The plaintiff
27 responded by denying all requests. *Id.* The response was dated December 15, 2005, and was
28 mailed in an envelope postmarked December 22, 2005. Dkt. 11 at 4. The certificate of service is

1 dated December 14, 2005, and Lucent received the response on December 27, 2006. *Id.* Lucent
2 moves the court to deem the requested admissions as admitted on the ground that the plaintiff
3 failed to timely deny the request. Dkt. 10.

4 **II. DISCUSSION**

5 **A. MOTION TO DEEM MATTERS ADMITTED**

6 Federal Rule 36 governs requests for admissions and provides as follows:

7 The matter is admitted unless, within 30 days after service of the request, or within such
8 shorter or longer time as the court may allow or as the parties may agree to in writing,
9 subject to Rule 29, the party to whom the request is directed serves upon the party
requesting the admission a written answer or objection addressed to the matter, signed by
the party or by the party's attorney.

10 Fed. R. Civ. P. 36(a). The 30 day time limit set forth in the rule is enlarged by three days, meaning
11 that Ms. Betker's answers and objections were due on December 14, 2005. *See* Fed. R. Civ. P.
12 6(a) (computation of time), 6(e) (adding three days to any prescribed time period that commences
13 with service by mail). The certificate of service states that Ms. Betker mailed the document on
14 December 14, 2005. *Id.* at 46. The date written on the document was December 15, and the
15 envelope was postmarked December 22, both of which suggest that the date written on the
16 certificate of service is unreliable. Pursuant to the Local Rules, Ms. Betker's failure to respond to
17 the motion is considered an admission that the motion has merit. *See* Local Rule CR 7(b)(2). The
18 court should therefore grant the motion in this respect.

19 **B. MOTION TO COMPEL**

20 Federal Rule of Civil Procedure 26 provides that "[p]arties may obtain discovery regarding
21 any matter, not privileged, that is relevant to the claim or defense of any party." Fed. R. Civ. P. 26
22 (b)(1). The party's answers to such discovery requests are due within 30 days of service of the
23 requests. Fed. R. Civ. P. 33(b)(3), 34(b). If a party fails to answer an interrogatory, the requesting
24 party may move to compel disclosure pursuant to Rule 37. Fed. R. Civ. P. 37(a)(2)(B). The
25 motion must certify that the parties have made a good faith effort to confer and resolve the
26 dispute themselves. Local Rule 37 (a)(2). Counsel for both parties have met in person to discuss
27 discovery matters in this case but have been unable to reach a resolution. *See* Dkt. 11 at 2.

28 It appears that Ms. Betker has made no effort to comply with Lucent's discovery requests,

1 despite her promise to provide answers to interrogatories on January 9. Dkt. 12 at 13. The court
2 also notes that Ms. Betker has failed to respond to this motion, which the court may properly
3 deem an admission that the motion has merit. Local Rule CR 7(b)(2). The court should therefore
4 grant the motion to compel.

5 **C. DISMISSAL AND SANCTIONS**

6 Citing Local Rule GR 3, Lucent moves the court to dismiss the plaintiff's case for failure
7 to prosecute and for failure to comply with the court's order extending the initial disclosure
8 deadline to August 8, 2005. Dkt. 10. Local Rule GR 3 provides that judgment may be entered
9 against a defaulting party who fails to meet and confer as provided by the Local Rules. GR 3(c).
10 While it appears that Ms. Betker has been rather unresponsive to the defendant's attempts to
11 procure the plaintiff's initial disclosures and answers to its discovery requests, there is no evidence
12 that Ms. Betker has failed to confer as provided by the Local Rules. The court should therefore
13 decline to dismiss the case on this ground.

14 Alternatively, the court may involuntarily dismiss a case if the plaintiff fails to prosecute
15 the case or to comply with rules and court orders. Fed. R. Civ. P. 41(b). Plaintiff's counsel has
16 failed to comply with the deadline for filing initial disclosures and has failed to respond to the
17 defendant's interrogatories. Dkt. 11 at 3. Ms. Betker did respond to the defendant's request for
18 admissions in December, however. Dkt. 11 at 4. While Ms. Betker's non-responsiveness borders
19 on constituting lack of prosecution, dismissing the case on its merits at this juncture would be an
20 inappropriately harsh penalty to Ms. Betker's client.

21 Lucent also moves for sanctions. Federal Rule 37 governs sanctions and provides as
22 follows:

23 If the motion is granted or if the disclosure or requested discovery is provided after the
24 motion was filed, the court shall, after affording an opportunity to be heard, require the
25 party or deponent whose conduct necessitated the motion or the party or attorney advising
26 such conduct or both of them to pay to the moving party the reasonable expenses incurred
27 in making the motion, including attorney's fees, unless the court finds that the motion was
28 filed without the movant's first making a good faith effort to obtain the disclosure or
discovery without court action, or that the opposing party's nondisclosure, response, or
objection was substantially justified, or that other circumstances make an award of
expenses unjust.

Fed. R. Civ. P. 37(a)(4)(A). Plaintiff's counsel has provided no justification for the failure to

1 provide initial disclosures and to comply with discovery requests. Pursuant to Federal Rule 37, the
2 court will grant plaintiff's counsel an opportunity to be heard as to why the court should not grant
3 the motion for sanctions and award the defendant \$2,750.00 as reasonable costs expended in filing
4 the motion to compel.

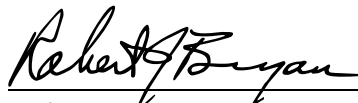
5 **III. ORDER**

6 Therefore, it is now

7 **ORDERED** that the Defendant's Motion to Deem the Matters in Defendant's Requests
8 for Admission as Admitted and to Compel Production of Initial Disclosures and Outstanding
9 Discovery Responses and for Sanctions is **GRANTED** as follows: The Motion to Deem the
10 Matters in Defendant's Requests for Admission as Admitted is **GRANTED**. The Motion to
11 Compel Production of Initial Disclosures and Outstanding Discovery Responses is **GRANTED**.
12 The plaintiff is directed to provide initial disclosures and complete answers and responses to the
13 Defendant Lucent Technologies, Inc.'s Special Interrogatories and Request for Production of
14 Documents forthwith and not later than February 24, 2006. Failure to comply with this court
15 order may result in additional sanctions. The motion for sanctions is **RE-NOTED** for February
16 24, 2006, and plaintiff's counsel may show cause in writing, if any she has, why the defendant
17 should not be awarded \$2,750.00 as reasonable expenses incurred in filing the motion to compel.

18 The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel
19 of record and to any party appearing *pro se* at said party's last known address.

20 DATED this 13th day of February, 2006.

21
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23 Robert J. Bryan
24 United States District Judge